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APR 4 1959
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No. 587

In the

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA,
Appellant,

v.

EVETTS HALEY, JR.,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

MOTION FOR REHEARING

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Appellee, subject to final disposition of his Motion to vacate and set aside the Order of this Court entered herein on February 24, 1959, respectfully requests a Rehearing on the Entry of said Order and in support thereof shows this Court as follows:

The rules of this Court, statute and precedent establish that this Court is without jurisdiction to entertain this appeal.

The decretal section of the Judgment *appealed directly to this Court from the District Court for the Northern District of Texas* reads:

> "ORDERED, ADJUDGED AND DECREED, that the plaintiff, United States of America, take nothing by its suit against the defendant, Evetts Haley, Jr., and that the costs of this action be and the same are hereby taxed against the plaintiff," (JS at 21).

28 U. S. C. 1252 provides in part as follows:

> "Any party may appeal to the Supreme Court *from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional* in any civil action * * * to which the United States * * * is a party."

Rule 54, 28 U. S. C. A. defines a Judgment in paragraph (a):

> "Definition; Form. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."

The difference between a Judgment and an opinion or docket entry has been recognized in the following cases.

U. S. v. Hark, opinion by Justice Roberts, *320 U. S. 531*, made this distinction:

> "Where a formal judgment is signed by the Judge this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry. In recent cases we have so treated it. U. S. v. Resnick, 299 U. S. 207; U. S. v. Midstate Horticultural Company, 306 U. S. 161. * * * He (the Judge) entered a formal order of record. We are unwilling to assume that he deemed this an empty form."

In *American Insurance Co. v. Scheufler, 129 Fed. 2d 143; Appeal Dismissed 314 U. S. 575; Certiorari denied 317 U. S. 687; Rehearing denied 317 U. S. 712,* this Court's rule was stated thusly:

> "We are not concerned with the written opinion of the trial court, as the statements therein may not be used to ascertain the evidence or the facts, or to control or modify the findings of fact upon which the Judgment is based. Loeb v. Trustees of Columbia Twp., 178 U. S. 472; Stone v. United States, 164 U. S. 380."

Winkleman v. General Motors Corporation, D. C. N. Y. held in 1942, 48 Fed. Supp. 490, that the Court's decision and Judgment to be entered thereon are not the same thing under the Federal Rules of Civil Procedure, since "decision" is a part of procedure, while "Judgments" are dealt with separately, and although a "decision" in a case is the court's "judgment" thereon, it is not necessarily its Judgment therein, meaning the Judgment thereafter entered on decision. The Court's findings like a Jury's verdict have not the same effect as a Judgment.

That an appeal cannot be taken from an opinion is established upon Supreme Court authority in *Holdsworth v. United States, Me. 1950, 179 Fed. 2d 933.*

On the basis of the foregoing Authorities Appellee submits that *there is no "Judgment" in this case which holds an Act of Congress unconstitutional and that this Court has no Jurisdiction of the direct appeal from the District Court* taken herein.

The cases cited by the Appellant as basis of this Court's Jurisdiction are in no way in point. In *Reid v. Covert, 351*

U. S. 487, 489, this Court stated: "It is conceded that, in issuing the Writ of Habeas Corpus the District Court held an Act of Congress unconstitutional." Obviously the point raised here was not even involved in that case. In *Fleming v. Rhodes, 331 U. S. 100, 102-104*, the Court stated that the sole inquiry was as to the propriety of the District Court's issuing an injunction. Therefore the Appellant has offered nothing to establish jurisdiction in this Court, and Jurisdiction should be refused.

Under the rule that a direct appeal to the Supreme Court will not lie when the judgment of the District Court rests in part on grounds independent of the invalidity or construction of the statute, this Court has no jurisdiction. *(U. S. v. Hastings, 296 U. S. 188; U. S. v. Halsey Stuart & Co., 296 U. S. 451; U. S. v. Borden Co., 308 U S, 188;* and *U. S. v. Wayne Pump Co., 317 U. S. 200.)*

If the Court considers the *opinion* rendered by the District Court, although Appellee contends that Jurisdiction must be refused on the basis of the *Judgment* alone, resort to the *opinion* should also result in dismissal of the appeal.

The Court is referred to the following excerpts from Judge Davidson's opinion:

> "Now, I am not going to base this decision solely on this point because if there can be a definite decision of an issue or controversy between men without denouncing any act as unconstitutional it is better to put it on the other paragraph where one is present." (SJ at 12.)

"Coming now, then, to a third proposition: The government has not made a case against this defendant." (SJ at 13.)

"Has this man anything to do with commerce? Only in production. You have to extend the law to production to administer any *punishment* in this case." (SJ at 14.)

"*I consider the interpretation of the Act* given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch." (SJ at 18.)

"I hardly think, however, that the court that sustained this law had before it the record that has been made here with its direful effect upon the public." (SJ at 9.)

It should be obvious, therefore, that the Appellant's remedy was *not* a *direct* appeal to this Court, but that any appeal should have been prosecuted to the United States Court of Appeals for the Fifth Circuit.

THE AGRICULTURAL ADJUSTMENT ACT OF 1938, AS AMENDED, IS SELF-DEFEATING SO FAR AS REDUCING SURPLUSES IS CONCERNED AND SHOULD BE DECLARED UNCONSTITUTIONAL IN ITS APPLICATION TO APPELLEE.

As a matter of plain common sense and justice, the said Act, enacted to avoid burdensome surpluses *(7 U. S. C. A. 1331)*, should not be used to penalize Appellee for growing 43 acres of wheat, when the Act had a built-in surplus of 36,419,355 acres in 1956. *7 U. S. C. A. 1333* provides that the national acreage allotment for wheat for any year shall be not less than fifty-five million (55,000,000) acres.

Secretary of Agriculture Ezra Taft Benson found the national acreage allotment as computed according to *7 U. S. C. A. 1333* to be 18,580,645 acres. He therefore was required to and did fix such allotment at fifty-five million acres (55,000,000) or 36,419,355 acres more than required to balance supply with need. F. R. Doc. 55-4023. As a matter of logic and fair play, it would seem logical, if Appellee is to be penalized for growing 43 acres of wheat, then the members of Congress should be penalized for their contribution of 36,419,355 acres of wheat to the swollen wheat surplus. Certainly, to enforce such penalty against the Appellee is contrary to the public policy of the United States and should be so declared by this Court. When a statute enacted by Congress cannot by its own terms accomplish its stated purpose *(7 U. S. C. A. 1331 and 1333)*, then this Court should declare such statute unconstitutional in such application.

WICKARD V. FILBURN, 317 U. S. 111, THE CASE CITED BY THIS COURT IN ITS SUMMARY REVERSAL, SHOULD BE OVERRULED AS GROSSLY UNSOUND.

The general scheme of the Agricultural Adjustment Act of 1938 was to regulate the volume of *wheat* moving in interstate commerce in order to avoid surpluses and shortages and consequent abnormal prices and obstructions to commerce. *317 U. S. at 115*. The Court assumed in that case that the consumption of farm grown wheat would reduce the demand for wheat on the open market as it would supply a need "which would otherwise be reflected

by purchases in the open market." *317 U. S. at 128.* This assumption was invalid for two reasons: (1) The farmer might not have the money to purchase wheat if he desired to purchase wheat in the open market, and (2) The farmer might well have elected to purchase any one of a number of other suitable feeds not controlled. The Act as it applies to instant case concerns only *wheat.* In the absence of evidence that Appellee would have purchased wheat if he had not grown and consumed wheat on the farm, this Court should not hold that his activities affected interstate commerce and should declare *Wickard v. Filburn,* supra, overruled in this respect.

Wickard v. Filburn, supra, if followed herein, would deprive Appellee of his property without due process of law guaranteed him by the Fifth Amendment. It certainly deprives him of his right to be let alone by the federal government, a right tacit in the Bill of Rights. The right to grow wheat and consume it on the farm where grown is an incident of the ownership of land and its products. In *U. S. v. Causby, 328 U. S. 256,* Mr. Justice Douglas wrote the majority opinion stating flights over plaintiff's land at low levels placed a "servitude" upon the land. He observed: "The owner's right to possess and exploit the land —that is to say, his beneficial ownership of it—would be destroyed." He further found that the fact that the "enjoyment and use of the land are not completely destroyed" was not controlling. In *Pennsylvania Coal Company v. Mahon, 260 U. S. 393,* Mr. Justice Holmes observed: "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes

as appropriating or destroying it." In his majority opinion, he further stated "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." These cases would seem to be authority that Appellee, if required to pay the penalty, has been deprived of due process of law.

If this Court sustains *Wickard v. Filburn*, supra, as applied to this case, then it has declared in effect that intrastate commerce is no more and that the Congress by definition [i.e. "Marketing", *7 U. S. C. A. §1301(b)(6)-(A)(B)*] can subject any activity to federal regulation by changing the conventional meanings of words. Just as the words "peace" and "democracy" are given special definitions by communist lexicographers, it may become necessary eventually to check the U. S. Code to see what new words have been debauched in order to extend the benevolent despotism of centralized power.

If the Court finally decides that Appellee is subject to penalty for growing wheat and consuming it on his own farm, it will have approved seizure of his property without due process and without compensation, all contrary to the Constitution. This Court will have made a substantial contribution to socialism in agriculture as exemplified in the

Agricultural Adjustment Act of 1938, as amended. Appellee urges this Court to reconsider its decision to reverse and to now declare that the right of citizens of this land to quiet enjoyment of their property cannot, under the Constitution, be overriden by Congressional acts which are ill-conceived and disasterous in their ultimate effects, but cleverly designed to bribe those whose approval is sought in annual referendums.

Appellee respectfully prays this Court to grant its Motion for Rehearing and to afford him a full hearing on the merits of the appeal including an opportunity for oral argument.

Respectfully submitted,

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